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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
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SANDRA K. HIGGINS, CLERK
BY: Kelly Gresham

5 IN THE SUPERIOR COURT

6 STATE OF ARIZONA, COUNTY OF YAVAPAI

7 STATE OF ARIZONA,

V1300CR201080049

8 Plaintiff,

9 vs.

10 JAMES ARTHUR RAY,

11 Defendant.

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO STRIKE AGGRAVATING
CIRCUMSTANCES AND PRECLUDE
ADDITIONAL AGGRAVATING
CIRCUMSTANCES

(The Honorable Warren Darrow)

12 The State of Arizona, through undersigned counsel, respectfully requests this Court to
13 deny the Defendant's Motion to Strike Aggravating Circumstances and Preclude Additional
14 Aggravating Circumstances.

15 The Defendant cites no case law to support the striking of an aggravating circumstance
16 found by the jury beyond a reasonable doubt. The Defendant's position that further evidence of
17 aggravating circumstances should be precluded is also in error. Finally, as explained below, an
18 analysis of the playing of approximately one minute of unadmitted audio, using relevant case law,
19 makes it clear the material did not contribute to the jury's verdicts on the aggravating circumstance
20 of emotional harm to the victims or the unique position of trust held by Lizbeth Neuman.

21 Reasons in support of the State's position are more fully set forth in the attached
22 Memorandum of Points and Authorities.
23
24
25
26

MEMORANDUM OF POINTS AND AUTHORITIES

Relevant Facts:

The trial in this case commenced on February 16, 2011 and continued through June 30, 2011. During the trial, the State called 33 witnesses in forty-three trial days. Over 900 exhibits were marked and over 500 exhibits were admitted during the trial. Included in the admitted exhibits were 31¹ audio clips from the Spiritual Warrior 2009 event submitted by the State. In total, the State's clips contained over an hour and 40 minutes of audio. In addition, the Defendant had two audio clips from the event admitted.² In total, the Defendant's exhibits contained 11 minutes of audio. Almost all of the audio consisted of recordings of Defendant addressing the participants at various stages during the event.

On June 22, 2011, the jury found Defendant guilty of the lesser included charge of negligent homicide for each of the three victims. Following the verdict, the jury returned to consider the three aggravating factors alleged by the State: (1) the Defendant committed the offense for the receipt, or in the expectation of the receipt, of anything of pecuniary value; (2) the victims' families suffered emotional harm as a result of the conduct of Defendant; and (3) the Defendant was in a unique position of trust with each victim. At the aggravation hearing, a representative of each family testified regarding the impact Defendant's conduct had on them and their families. The State offered no additional evidence and the hearing proceeded to closing arguments.

¹ Exhibit 734 contained 20 separate audio clips played during the State's opening and subsequently admitted at trial. Additional audio clips were admitted as Exhibit No. 743, 744, 745, 747, 749, 754, 756, 757, 758, 760, and 782.

² Exhibits 778 and 780.

1 In the State's closing argument in support of the pecuniary gain aggravator, the State
2 intended to play six audio clips relating to the cost of spiritual warrior or referencing the
3 "investment" the participants had made to attend. When the second clip was played, Defendant
4 objected to the clip insisting the audio had not been admitted during trial. The State responded
5 by providing the exhibit numbers of the all of the audio clips it intended to play in its
6 aggravation close and referencing them to the exhibit list indicating they had been admitted. The
7 State also provided Defendant a copy of the CD containing the eight audio clips it intended to
8 play during its closing argument. This Court then recessed to allow Defendant to verify the clips
9 had been admitted. After a short break, Defendant notified this Court that it was ready to resume
10 closing arguments. Closing remarks then resumed.

12 In the State's closing argument, it played six audio clips in support of the pecuniary gain
13 aggravator. *Reporter's Transcript (R.T.)*, 6/29/11 at 37:6 - 40:6. The State also played two audio
14 clips in support of the aggravating factor that Defendant was in a unique position of trust with
15 each of the victims. *Id.* at 40:7 - 41:6. In support of the emotional harm to the victims' families,
16 the State presented the trial exhibits showing each victim was admitted as Jane/John Doe and
17 referencing the delays in notifying the families as a result. The State then offered the following:

19 You heard from just a few family members -- a mother, a daughter, and a wife.
20 And there is nothing I can say to add to that heart wrenching testimony. But you
21 have clearly heard, ladies and gentlemen, evidence beyond any reasonable doubt
22 that the families have suffered emotional harm.

22 *Id.* at 50:2-8.

23 In Defendant's closing argument, Mr. Kelly made the following argument relating to the
24 aggravating circumstance of emotional harm to the victims:

26 Now, the second aggravating circumstance is that the victim has died as a result
of the conduct of defendant and has suffered emotional harm. ***And, of course,
there is no doubt that the victims have suffered emotional harm. We heard them***

1 *yesterday. There is just absolutely no dispute about that.* The real question for
2 you to decide is -- when you go back is whether the conduct of the defendant
caused that emotional harm.

3 *Id.* at 66:24 to 67:5 (emphasis added).

4 After the jury went into deliberations, the State requested the Court make a record that
5 Defendant had withdrawn its objection to the audio clips. In response, Defendant indicated it had
6 not withdrawn its objection, but had returned only to "facilitate the continued jury trial." *Id.* at
7 80:13 – 81:11.
8

9 On June 30, 2011, the jury found the State had proven beyond a reasonable doubt the
10 aggravating circumstance of emotional harm to each of the victims' immediate families. The jury
11 also found the State had proven that Defendant was in a unique position of trust with victim
12 Lizbeth Neuman. The jury was deadlocked on the remaining aggravating circumstances alleged
13 by the State. At the conclusion of the hearing, Defendant again raised the issue of Exhibit 734,
14 claiming that audio on the exhibit had not been played for the jury during trial and submitted as
15 Exhibit 1136 a DVD containing the State's Opening Statement. The State requested time to
16 review the issue and requested that the State be provided with the FTR Gold recordings of the
17 Opening Statement. This Court then ordered the FTR Gold recordings be provided to both the
18 State and Defendant.
19

20 Following the hearing, the State compared the audio on Exhibit 734 to both Exhibit 1136
21 (the State's Opening Statement) and the FTR Gold recordings, and confirmed that all of the
22 audio clips on Exhibit 734 had been played during its Opening Statement. *See State's Notice Re:*
23 *Exhibit 734 and the State's Opening Statement.* The State also requested copies of all of the
24 admitted audio clip exhibits from the court clerk and compared the Court's copies to the State's
25 records of the recordings. In conducting this review, the State found that one of the audio clips
26

1 played in the aggravation phase of the trial contained approximately one minute of audio that
2 had been cut from the clip admitted at trial as Exhibit 744. Upon identification of this error, the
3 State immediately provided notice to this Court and Defendant. *See State's Notice of Error in*
4 *Playing of Exhibit 744 during Aggravation Hearing.*

5 As noted in the State's Notice, the following portion of the audio played for the jury was
6 not included in Exhibit 744:

7
8 If you're really truly set on bending commitment I'm really going to do whatever
9 it takes no matter how uncomfortable it is no matter how frightening, then you
10 will have a breakthrough. You may feel as if you're having a breakdown some
11 point in time and that's okay because sometimes the walls must come down so
12 that new walls may be built. But I promise you you'll have a breakthrough and
13 that's what you really want isn't it. I mean isn't that why you made the
14 investment to be here and you trudged off to the desert to sleep in a tent and share
15 bathrooms. You know I mean some of you are already having a breakdown. For
16 the amount of money I spent you think I'd have my own shower and my
17 roommate snores (laughter), but a least he's consciously aware of that and so
18 again . . . (*Here the clip begins with the audio admitted as Exhibit 744.*)

19 *Id.*

20 On June 11, 2011, Defendant filed a Motion for New Trial in which he alleged
21 prosecutorial misconduct. Included in the multiple allegations of prosecutorial misconduct was
22 the error of the State in playing the uncut version of Exhibit 744. In its response, the State again
23 admitted its error in playing the clip. However, because the clip was played in support of the
24 allegation of pecuniary gain and this aggravator was not found by the jury, the State argued that
25 any error was harmless. On September 14, 2011, this Court denied Defendant's Motion for New
26 Trial.

On November 3, 2011, four days before the sentencing hearing was to start, Defendant
filed the instant motion. Not only is Defendant's motion untimely, it is without legal or factual
merit.

1 **Legal Argument:**

2 **I. The playing of the audio did not prejudice Defendant.**

3 Repeatedly referring to the unadmitted portion of the audio as “inflammatory,”
4 Defendant argues that, “the State cannot prove, and this Court cannot conclude,” the jurors were
5 not affected by the unadmitted portion of the audio clip to such a degree that it affected their
6 conclusions regarding emotional harm to the victims and a relationship of trust to Lizbeth
7 Neuman. The State disagrees.
8

9 While it is true that some of the audio clips admitted during trial, such as when the
10 Defendant pronounces he is God, may be viewed as dramatic, many more are rather mundane
11 and certainly cannot be seen as “inflammatory.” Defendant admitted over 11 minutes of audio
12 from the event; certainly he would not have done so if he believed every clip from the event to
13 be “inflammatory.” The one minute clip that is at issue here is not in any way “inflammatory.”
14

15 The unadmitted portion of the audio clip has absolutely nothing to do with emotional
16 harm to the victims. As Mr. Kelly stated during his closing remarks, “[t]here is just absolutely no
17 dispute” that the victims have suffered emotional harm in this matter. *R.T.*, 6/29/11 at 66:22-
18 67:5. Similarly, the unadmitted audio has nothing to do with Defendant’s long standing
19 relationship with victim Lizbeth Neuman. During trial the jury heard evidence of Ms. Neuman’s
20 faithful following of Defendant and the numerous events she had attended and dream-teamed.
21 The jury found that Defendant was in a unique position of trust with Ms. Neuman, but failed to
22 find such a relationship existed between Defendant and Kirby Brown and James Shore. For
23 Defendant’s argument to have any merit, the jury would not have distinguished the nature of
24 these relationships and would have simply found all of the aggravators alleged by the State.
25
26

1 In *State v. Hall*, 204 Ariz. 442, 65 P.3d 90 (2003), the Arizona Supreme Court identified
2 the factors a court should consider in determining whether extrinsic evidence has contributed to a
3 verdict. The five factors are as follows:

- 4 1. Whether the prejudicial statement was ambiguously phrased;
- 5 2. Whether the extraneous information was otherwise admissible or merely
- 6 cumulative of other evidence adduced at trial;
- 7 3. Whether a curative instruction was given or some other step taken to ameliorate
- 8 the prejudice;
- 9 4. The trial context; and
- 10 5. Whether the statement was insufficiently prejudicial given the issues and
- 11 evidence in the case.

12 *Id.* at ¶ 19, 65 P.3d at 96.

13 “Factor Four, the trial context, includes ‘whether the material was actually received, and
14 if so, how; the length of time it was available to the jury; the extent to which the jurors discussed
15 and considered it; whether the material was introduced before a verdict was reached, and if so at
16 what point in the deliberations; and any other matters which may bear on the issue of the
17 reasonable possibility of whether the extrinsic material affected the verdict.’” *Id.* As explained
18 below, the Defendant’s argument fails when properly examined against the test set out by our
19 Arizona Supreme Court.

20
21 → **Factor One: The unadmitted statement was neither prejudicial nor ambiguous**

22 With regard to the first factor, although Defendant describes the unadmitted audio as
23 inflammatory, it is neither prejudicial nor ambiguous. The Defendant’s attorney, Thomas Kelly,
24 argued in his Closing Argument Aggravation Phase:

25
26 You know, the investment described on that audio clip was for a
breakthrough, a breakthrough, I didn’t hear anybody say the investment is I’m
going to subject you to a heat-endurance challenge that’s going to cause your
death. Trust me. I’m in a unique position in which I’m going to subject you to a

1 unique heat-endurance challenge that's going to cause your death. That's simply
2 not this case.

3 The exhibit today you heard said, my intentions for you are such things as
4 accelerating your enlightenment. You have to choose as to the intensity upon
5 which you decide to play. You have to choose what level you decide to play.
6 You've invested a lot of money.

7 If you were to come back finding the aggravating circumstance of
8 pecuniary gain has been met beyond a reasonable doubt, then you would have to
9 find that Mr. Ray killed these people for money. It's a very poor business model.

10 R.T., 6/29/11 at 64:21 – 65:15.

11 → **Factor Two: The extraneous information was both otherwise admissible and merely**
12 **cumulative of other evidence adduced at trial.**

13 As to the second factor, the information on the unadmitted portion of the audio clip
14 would have been admissible had the State offered it at any time during trial or the aggravation
15 phase pursuant to the Arizonan Rules of Evidence. The audio contains only the Defendant's
16 words, is therefore not hearsay, *Rule 801(D)(2), Ariz. Rules of Evidence*, was relevant and was
17 clearly otherwise admissible.

18 Likewise, the unadmitted audio was clearly cumulative to other evidence admitted at
19 trial. The State played the audio clip in arguing the aggravating circumstance of pecuniary gain.
20 Specifically, the clip was played to emphasize that Defendant had told the participants they had
21 made an "investment" to attend Spiritual Warrior. There was ample evidence of this fact
22 admitted at trial and in multiple forms:

- 23 • Similar words by Defendant are contained in Exhibit 745, admitted at trial
24 and also played for the jury in the State's Closing Argument during the
25 Aggravation Hearing. Specifically, the jury heard in Exhibit 745 that
26 Defendant reminded the participants on Sunday that they had invested a
lot of time and money to be there, and they should not waste time
sleeping.
- Testimony of the participants established the investment they had made to
attend Spiritual Warrior 2009.

- Exhibit 138, the Spiritual Warrior brochure, indicates the “investment” to attend Spiritual Warrior was \$9,695.
- The client files of Kirby Brown and James Shore, that were admitted, indicate the amount they paid to attend.

→ **Factor Three: Is Inapplicable**

Factor three does not apply to the instant case because the State’s error was not found until after the jury returned with its verdicts on the aggravators.

→ **Factor Four: The trial context shows no prejudice to Defendant.**

The State can find no cases where the extrinsic evidence was only introduced during the aggravation phase of a trial; however, the unadmitted portion of the clip was only one minute of almost two hours of audio admitted at trial. Although Defendant would have this Court dismiss the fact that the audio was only applicable to the aggravating circumstance of pecuniary gain, it clearly was the case. If fact, when it was played, the jury was viewing a PowerPoint slide that consisted only of the words “Pecuniary Gain” and the exhibit numbers of the clips being played. Moreover, had the jurors chosen to replay the clips on the slide during deliberations, they would not have been re-exposed to the unadmitted audio because it was not included on Exhibit 744.

→ **Factor Five: Given the issues and evidence in this case, the statement was insufficiently prejudicial.**

The playing of the one minute of unadmitted audio must be found to be harmless given the issues and the evidence in this case. The jury found the State had failed to prove the aggravating circumstance of pecuniary gain, and found only the specifically enumerated aggravating circumstance of emotional harm to the victims’ families. Clearly, the clip had no effect on the determination of the emotional harm, which was conceded by Defendant. The only additional aggravating circumstance found by the jury was that Defendant was in a unique

1 position of trust with victim Lizbeth Neuman. Once again, the information contained on the clip
2 had no impact on the determination of this aggravating circumstance.

3 Based on the above analysis, it is clear that the playing of one minute of unadmitted
4 audio during the Closing Argument in the Aggravation Hearing was harmless, had no impact on
5 the jury's determination of aggravating circumstances, and no prejudice resulted to Defendant.
6 Accordingly, Defendant's Motion to Strike the Aggravating Circumstances found by the jury
7 should be denied.
8

9 **II. A trial court is free to consider additional aggravating circumstances at**
10 **sentencing as long as the sentence imposed does not exceed the sentence authorized by the**
11 **jury.**

12 As noted above, this Court should deny Defendant's Motion to Strike the Aggravating
13 Circumstances found by the jury. However, even if this Court were to find any merit to
14 Defendant's argument and strike the statutory aggravator of emotional harm to the victims, this
15 Court would still be free to consider additional aggravating circumstances as long as the sentence
16 imposed does not exceed the sentence authorized by the jury's finding of guilt. Contrary to
17 Defendant's argument, *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403
18 (2004), does not preclude a trial court from considering aggravating circumstances that have not
19 been found by a jury.

20 In *State v. Miranda-Cabrera*, 209 Ariz. 220, 99 P.3d 35 (App. 2004), the Court of
21 Appeals found the trial court's consideration of three aggravating factors not found by a jury did
22 not implicate *Blakely*. The trial court had balanced the three aggravators with three mitigating
23 factors and imposed a mitigated sentence of three years less than the presumptive. In upholding
24 the trial court's consideration of aggravators not found by a jury, the Court of Appeals stated:
25

26 We need not remand for resentencing merely because Miranda-Cabrera's
mitigated sentence might have been for a shorter period had the trial court not set

1 off aggravating factors against the mitigating factors in imposing the mitigated
2 sentence. ***Because the court's consideration of the sentencing factors did not***
3 ***result in the imposition of a sentence above that which the judge was entitled to***
4 ***impose based on "the facts reflected in the jury verdict or admitted by the***
5 ***defendant," the sentence imposed does not violate the Sixth Amendment.***
6 ***Blakely***, 124 S.Ct. at 2537 (citing *Ring*, 536 U.S. at 602, 122 S.Ct. 2428).

7 As *Blakely* explains, the Sixth Amendment does not remove all discretion
8 from the judge in sentencing. *Id.* at 2540. The Sixth Amendment is a reservation
9 of a jury right, not a limitation on judicial power. *Id.* Thus, the Sixth Amendment
10 vests in the jury the right to make all the factual determinations legally essential
11 to the punishment imposed. *Id.* at 2543. Once a jury has found all of the facts
12 required for the court to impose a punishment upon a defendant in a specific case,
13 ***the judge is free to consider any other factors, both aggravating and mitigating,***
14 ***in imposing a lesser sentence.*** *Id.* at 2537 (citing *Ring*, 536 U.S. at 602, 122 S.Ct.
15 2428).

16 *Id.* at 42. (emphasis added).

17 In this case, the jury found the State had proven the aggravating circumstance of
18 emotional harm to each of the victim's families beyond a reasonable doubt. This is a specifically
19 enumerated aggravating circumstance set forth in A.R.S. § 13-702(D)(9).³ Arizona Revised
20 Statute § 13-701(F) provides that, "[i]f the trier of fact finds a least one aggravating
21 circumstance, the trial court may find by a preponderance of the evidence additional aggravating
22 circumstances." As a result of the jury's finding and pursuant to A.R.S. § 13-701(F), this Court
23 may now "find and consider additional factors relevant to the imposition of a sentence up to the
24 maximum prescribed in [A.R.S. § 13-702(D)]."⁴ *State v. Martinez*, 210 Ariz. 578, 585, 115 P.3d
25 618, 625 (2005) ("[O]nce a jury finds or a defendant admits a single aggravating factor, the Sixth
26

³ In addition to the emotional harm aggravator, the jury found an additional aggravating circumstance that Defendant was in a unique position of trust with Lizbeth Neuman. This aggravating circumstance falls under the "catch-all" provision set forth in A.R.S. § 13-702(24) and is not a specifically enumerated aggravating circumstance.

⁴ Because the jury found only one specifically enumerated aggravating circumstance, the State submits that Defendant may not be sentenced to the substantially aggravated term set forth in A.R.S. § 13-702 (D). See *State v. Perrin*, 222 Ariz. 375, 378, 214 P.3d 1016, 1019 (App. 2009).

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1 Amendment permits the sentencing judge to find and consider additional factors relevant to the
2 imposition of a sentence up to the maximum prescribed in that statute.”) Moreover, although
3 A.R.S. § 13-701(C)(24) provides that this Court is able to consider “any other factor that the
4 state alleges is relevant to the defendant’s character or to the nature or circumstances of the
5 crime,” the use of the term “allege” does not limit the authority of the trial judge to find, *sua*
6 *sponte*, only those aggravating circumstances formally alleged by the prosecution. *See State v.*
7 *Marquez*, 127 Ariz. 3, 5-6, 617 P.2d 787, 789-790 (1980).

9 Provided the Court does not impose a sentence greater than that authorized by the jury’s
10 finding, this Court is free to consider “any reliable, relevant evidence, including hearsay,” in
11 determining additional aggravating circumstances applicable to its sentencing determination.”
12 *Rule 26.7(b), Ariz. R. Crim. P.*

13 RESPECTFULLY submitted this 14th day of November, 2011.

14
15
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19 **COPIES** of the foregoing emailed this
20 14th day of November, 2011:

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COPIES of the foregoing delivered this
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(Trial court required to find at least two enumerated factors in order to impose a substantially aggravated sentence.)

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